



DEPARTMENT OF DEFENSE

BILLING CODE 5001-06

Office of the Secretary

DOD-2010-OS-0043; RIN 0790-AI62

32 CFR Part 222

DoD Mandatory Declassification Review (MDR) Program

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This part implements policy established in DoD Instruction 5200.01. It assigns responsibilities and provides procedures for members of the public to request a declassification review of information classified under the provisions of Executive Order 13526, or predecessor orders.

EFFECTIVE DATE: This rule is effective [INSERT DATE 30-DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Robert Storer, 571-372-0483.

SUPPLEMENTARY INFORMATION:

The Department of Defense published a proposed rule on September 27, 2010 (75 FR 59176-59179). Three sets of comments were received and are addressed below.

Comment 1: As an initial matter, this proposed rule contains no paragraph (j), and there appears to be no current paragraph (j) to which this could be referring. While it is entirely reasonable for the DoD to amend this rule later to cover the issue of fees, it is improper for the DoD to include a reference *now* to a potential later amendment that will itself have to go through the notice and comment rulemaking procedure. It is far more reasonable to leave this subparagraph out of the current iteration and add it when the actual paragraph (j) is added to the rule.

Response 1: Paragraph revised to be consistent with section 2001.33 (e) of 32 C.F.R. (see section 222.10)

Comment 2: It is entirely proper that a requester shall not be given MDR appeal rights for records withheld pursuant to FOIA exemptions. However, it is not proper for records to be withheld pursuant to FOIA exemptions as part of the MDR process without providing the proper appeal rights that accompany all FOIA withholding decisions.

Response 2: The FOIA and MDR process are separate and distinct processes. A MDR is not a FOIA Request; a requester does not have the right to appeal MDR's denied under FOIA exemptions without having filed a FOIA Request. If a requester is denied under the rules of FOIA, the requester must submit a FOIA request for those records in order to have the exemptions examined. (See par 4 and par 5(c)3(d)) of section 222.5.)

Comment 3: Proposed Section 222.5(a)(vii) reads as follows: "This section shall not apply to any request for a review made to an element of the Intelligence Community that is made by a person other than an individual as that term is defined by 5 U.S.C. 552a(a)(2), or by a foreign government entity or any representative thereof."

This language differs meaningfully from the interpretive guidance rules in Section 32 CFR 2001.33(i), which say, in part, "requests for mandatory declassification review made to an element of the Intelligence Community by anyone other than a citizen of the United States or an alien lawfully admitted for permanent residence may be denied by the receiving Intelligence Community element."

Response 3: Section removed from final rule.

4: Comments from DoD Internal review of proposed rule:

- a. Change the Executive Order in the last line of Paragraph 1 from 12958 to 13526.

b. Appoint an appellate authority and process MDR appeals for information originating in the OSD, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, and DoD components not listed in the Appendix to Enclosure 2.

c. Insert reference to DoD 5200.1-R so the paragraph reads “The DoD Components shall process MDR requests... in accordance with DoD 5200.1-R and Part 2001 of title 32...”

d. Replace paragraph 7.b with the following

(or similar) statement: “The DoD Component shall consult with DOS as necessary to determine whether the information is subject to a treaty or international agreement that would prevent its declassification. The office to consult is...” (U//FOUO) The purpose of the statement is to allow DoD intelligence organizations that have existing, authorized agreements for coordinating actions on FGI to continue to use those arrangements with counterpart organizations of foreign governments for the purposes of coordinating Mandatory Declassification actions.

e. Updated all DoD Component contact information

Response to Internal Comments: Internal comments from staffing reviews were incorporated as appropriate. Changes were made in the following sections: references, paragraph (d), § 222.5 MDR processing procedures of the final in response to the comments received.

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

It has been certified that 32 CFR part 222 does not:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

Sec. 202, Pub. L. 104-4, "Unfunded Mandates Reform Act"

It has been certified that 32 CFR part 222 does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been certified that 32 CFR part 222 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. The rule implements the procedures for the effective administration of the DoD MDR Program.

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 222 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, "Federalism"

It has been certified that 32 CFR part 222 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 222

Declassification, Security information.

Accordingly, 32 CFR part 222 is added to read as follows:

PART 222 - DOD MANDATORY DECLASSIFICATION REVIEW (MDR) PROGRAM

Sec.

222.1 Purpose.

222.2 Applicability.

222.3 Definitions.

222.4 Responsibilities.

222.5 MDR processing procedures.

Appendix A to Part 222 – Addressing MDR requests.

Authority: 5 U.S.C. 552

§222.1 Purpose.

This part implements policy established in DoD Instruction 5200.01. It assigns responsibilities and provides procedures for members of the public to request a declassification review of information classified under the provisions of Executive Order 13526, or predecessor orders.

§222.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within DoD (hereafter referred to collectively as the “DoD Components”).

§222.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Foreign Government Information (FGI). Defined in DoD 5200.1-R (available at

<http://www.dtic.mil/whs/directives/corres/pdf/520001r.pdf>).

Formal Control System. A system designed to ensure DoD Component accountability and compliance. For each MDR request, the system shall contain, at a minimum, a unique tracking number, requester's name and organizational affiliation, information requested, date of receipt, and date of closure.

Formerly Restricted Data. Defined in DoD 5200.1-R.

MDR. The review of classified information for declassification in response to a declassification request that meets the requirements under section 3.5 of Executive Order 13526, "Classified National Security Information," December 29, 2009.

Restricted Data. Defined in DoD 5200.1-R.

§222.4 Responsibilities.

(a) The Director, Washington Headquarters Services, shall process MDR requests for OSD, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, and DoD Components not listed in the Appendix A to this part.

(b) Heads of the DoD Components. The Heads of the DoD Components listed in the Appendix A to this part shall:

(1) Establish procedures for the processing of MDR requests and appeals for information originating within the Component.

(2) Appoint an appellate authority to adjudicate MDR appeals for the Component.

§222.5 MDR processing procedures.

(a) General. The DoD Components shall process MDR requests from the public for classified information originating within the DoD Component in accordance with DoD 5200.1-R and 32 CFR part 2001.

(b) Information not subject to review for public release under the MDR includes:

(1) Unclassified information (to include documents) or previously classified documents that are declassified prior to the receipt of the MDR request. These documents must be requested under the provisions of 5 U.S.C. 552(b) (also known and hereinafter referred to as the “Freedom of Information Act” (FOIA) and 32 CFR part 286.

(2) Information (to include documents) reviewed for declassification within 2 years preceding the date of receipt of the MDR request. If this is the case, the requester shall be provided the documents as previously released and advised of the right to appeal to the DoD Component within 60 days unless the documents are already under appeal to the Interagency Security Classification Appeals Panel (ISCAP).

(3) Information exempted from search and review by statute of 50 U.S.C. 431, 432, 432a, 432b, and 432d.

(4) Documents originated by the incumbent President; the incumbent President’s White House Staff; committees, commissions, or boards appointed by the incumbent President; or other entities within the Executive Office of the President that solely advise and assist the incumbent President.

(5) Information marked as Restricted Data or Formerly Restricted Data.

(6) Information that is the subject of pending litigation.

(c) MDR Requester Guidelines. Members of the public seeking the declassification of DoD documents under the provisions of section 3.5 of Executive Order 13526, and 50 U.S.C. 431, 432, 432a, 432b, and 432d shall:

- (1) Address the written request to the appropriate DoD Component listed in the appendix to this enclosure.
- (2) Identify the requested document or information with sufficient specificity to enable the DoD Component to locate it with a reasonable amount of effort. Information that would provide the sufficient specificity would include a document identifier such as originator, date, title, subject, the National Archives and Records Administration accession number, or other applicable unique document identifying number. Broad or topical MDR requests for records on a particular subject, such as “any and all documents concerning” a subject do not meet this standard.
- (3) Include a correct return mailing address with the request.
- (4) Include a statement that the requester understands that the request may incur processing charges in accordance with paragraph (k) of this section.

(d) Receipt and Control. Upon receipt of an MDR request, the DoD Component shall send the requester an acknowledgement and open a file in a formal control system. The acknowledgement shall include the tracking number and date of receipt of the request.

(e) Simultaneous MDR and FOIA Requests. DoD Components should be aware of possible requests under both the MDR and the FOIA. In accordance with 32 CFR part 286, if a requester asks for the same information under the FOIA and the MDR, the DoD Component shall ask the

requester to select only one process. If the requester does not select a process, the DoD Component shall process the requested information under the FOIA.

(f) MDR Document Review Process. (1) Requests normally will be processed on a first in first out basis by date of receipt.

(2) Every effort shall be made to ensure that a response to an MDR request is provided to the requester within 1 year from the date of receipt.

(3) The DoD Components shall conduct line-by-line reviews of documents responsive to an MDR request to determine if the information contained within the documents continues to adhere to the standards for classification according to Executive Order 13526 Classified National Security Information. This line-by-line review must take into account the unique sensitivity of FGI as outlined in paragraph (h) of this section. In accordance with section 3.6(b) of Executive Order 13526 Classified National Security Information, classified information originating with another U.S. Government agency contained in records of the DoD Components will be referred to the originating agency for a declassification and release determination. Likewise, classified information in a DoD Component's records originating with another DoD Component will be referred to the originating Component. It is the responsibility of the DoD Component originally receiving the MDR request to manage these referrals and to incorporate the other agency's or DoD Component's determinations when preparing the final decision on the request. The review of each document will determine if the document:

(i) No longer meets the standards for classification as established by Executive Order 13526 "Classified National Security Information", and is therefore declassified in full.

(ii) Contains portions still meeting the standards for classification and is therefore declassified in part and denied in part.

(iii) Still meets the standards for classification in its entirety and is therefore denied in full.

(4) For documents meeting the criteria of paragraphs (f)(3)(i) and (f)(3)(ii) of this section, the DoD Components shall not release any unclassified information exempt from public release pursuant to Exemptions 2 through 9 of the FOIA. DoD 5400.7-R, "DoD Freedom of Information Act Program" provides a more detailed explanation of the FOIA exemptions.

(5) When this process is complete, the DoD Components shall redact all information, both classified and unclassified, determined to be exempt from release as warranted under applicable law and authority. All of the remaining information within the documents, which is determined to be publicly releasable information, shall be provided promptly to the requester.

(g) Public Access. In the interest of transparency, the DoD Components should make efforts to post documents released under the MDR program on DoD Component websites.

(h) FGI. Every effort must be made to ensure that FGI is not subject to declassification without the prior consent of the originating government. Therefore, if a requested document originated with a foreign government or organization and was classified by that government or organization, the DoD Component shall conduct MDR of the document in accordance with DoD 5200.1-R and 32 CFR Part 2001.

(i) Denial of Information. (1) When classified information is denied, the DoD Component shall advise the requester, in writing:

(i) That information currently and properly classified has been denied (whether a document in its entirety or partially) in accordance with the appropriate sections of Executive Order 13526 Classified National Security Information.

(ii) Of the right to appeal the denial to the DoD Component within 60 days of receipt of the denial.

(iii) Of the mailing address for the appellate authority.

(2) When unclassified information is withheld because it is determined to be exempt from release pursuant to Exemptions 2 through 9 of the FOIA (whether or not classified information was also withheld within the same document), the DoD Component shall advise the requester that:

(i) Section 3.5(c) of Executive Order 13526 Classified National Security Information allows for the denial of information when withholding it is authorized and warranted under applicable law.

(ii) Unclassified information exempt from public release pursuant to one or more exemptions of the FOIA has been withheld.

(3) For the denial of unclassified information, the requester shall not be given MDR appeal rights because the MDR applies only to the denial of classified information and because the request was not processed under the FOIA.

(4) The DoD Component is not required to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified pursuant to Executive Order 13526 Classified National Security Information.

(f) MDR Appeals. MDR appeals are for the denial of classified information only. DoD Components shall make an appellate decision within 60 working days of receipt of an MDR

appeal. If additional time is required to make a determination, the appellate authority shall notify the requester of the additional time needed and provide the requester with the reason for the extension. When the appellate review is complete, the appellate authority shall notify the requester in writing of the final determination and of the reasons for any denial. If the appellate authority determines that some information remains classified under the provisions of Executive Order 13526 Classified National Security Information, the requester will be advised of the right to appeal the final decision to the ISCAP within 60 days of the final Component decision, in accordance with section 5.3 of Executive Order 13526 Classified National Security Information.

(k) FEES. In responding to MDR requests, the DoD Components may charge fees as permitted by 32 CFR Part 2001. Fees for search, review, and reproduction shall be in accordance with the fee schedule in Appendix 2 of Chapter 4 of Volume 11A of DoD 7000.14-R (available at http://comptroller.defense.gov/fmr/11a/11a_04.pdf).

Appendix A to Part 222 - Addressing MDR Requests

(a) General. The Department of Defense does not have a central repository for DoD records. MDR requests therefore should be addressed to the DoD Component that has custody of the requested record. If a requester is not sure which DoD Component has custody or if the DoD Component is not listed below, the MDR request should be directed to the Washington Headquarters Services in paragraph (b)(1) of this appendix

(b) DoD Component MDR Addresses

(1) OSD and the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff.

Department of Defense, Washington Headquarters Services, Records and Declassification Division, Suite 02F09-02, 4800 Mark Center Drive, Alexandria, Va, 22350-3100.

EXCEPTION: DoD Inspector General. DoD Office of Inspector General, 400 Army Navy Drive, Arlington, VA 22202-4704.

(2) Department of the Army. U.S. Army Declassification Activity, Attention: AHRC-RDD, 8850 Richmond Highway, Suite 300, Alexandria, VA 22309.

(3) Department of the Navy.

(i) Department of the Navy, Chief of Naval Operations, CNO N09N2, 2000 Navy Pentagon, Washington, DC 20350-2000. (Collateral MDR)

(ii) Department of Navy, Chief of Naval Operations, CNO N2/N6, 2000 Navy Pentagon, Washington, DC 20350-2000. (Sensitive Compartmented Information MDR)

(4) Department of the Air Force. Department of the Air Force, HAF/IMIO (MDR), 1000 Air Force Pentagon, Washington, DC 20330-1000.

(5) United States Marine Corps. Commandant of the Marine Corps, HQMC Code PP&O, Security Division (PS), 3000 Marine Corps Pentagon, Room 4A324, Washington, D.C. 20350-3000

(6) Defense Advanced Research Projects Agency. Defense Advanced Research Projects Agency, 3701 N. Fairfax Drive, Arlington, VA 22203-1714.

(7) Defense Contract Audit Agency. Director, Defense Contract Audit Agency, Attention: CPS, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

(8) Defense Information Systems Agency. Defense Information Systems Agency, Attention: Security Division, MPS 6, 5111 Leesburg Pike, Suite 100, Falls Church, VA 22041.

- (9) Defense Intelligence Agency. Defense Intelligence Agency, Attention: DAN-1A (FOIA), Washington, DC 20340-5100.
- (10) Defense Logistics Agency. Defense Logistics Agency, Attention: DLA/DSS-S, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221.
- (11) Defense Security Service. Defense Security Service, Office of FOIA & Privacy, 1340 Braddock Place, Alexandria, VA 22314-1651.
- (12) Defense Threat Reduction Agency. Defense Threat Reduction Agency, Attention: SCR 8725 John J. Kingman Road, Fort Belvoir, VA 22060-6201.
- (13) Missile Defense Agency. Missile Defense Agency, Attention: MDA/DS, 7100 Defense Pentagon, Washington, DC 20301-7100.
- (14) National Geospatial-Intelligence Agency. National Geospatial-Intelligence Agency, Mail Stop D-10, 4600 Sangamore Road, Bethesda, MD 20816-5003.
- (15) National Reconnaissance Office. National Reconnaissance Office, NRO-MSO-ASG-IMSC-IART', 14675 Lee Road, Chantilly, VA 20151-1715.
- (16) National Security Agency/Central Security Service. National Security Agency, Declassification Office, DJP5, 9800 Savage Road, Suite 6884, Fort George G. Meade, MD 20755-6884.
- (17) North American Aerospace Defense Command. HQ NORAD/CSO, 250 Vandenberg St. Ste B016, Peterson AFB, CO 80914.
- (18) U.S. Africa Command. US Africa Command, Unit 29951, ATTN: COS-FOIA, APO AE 09751.
- (19) U.S. Central Command. U.S. Central Command, Attention: CCJ6-RDD, 7115 South Boundary Blvd., MacDill AFB, FL 33621-5101.

- (20) U.S. European Command. U.S. European Command, Attention: ECJ1-AX, Unit 30400, APO AE 09131.
- (21) U.S. Joint Forces Command. U.S. Joint Forces Command, Code J02SM, 1562 Mitscher Ave., Suite 200, Norfolk, VA 23511-2488.
- (22) U.S. Northern Command. U.S. Northern Command, HQ USNORTHCOM/CSO, 250 Vandenberg Street, Suite B016, Peterson AFB, CO 80914-3804.
- (23) U.S. Pacific Command. U.S. Pacific Command, Attention: J151 FOIA, Box 64017, Camp Smith, HI 96861-4017.
- (24) U.S. Southern Command. U.S. Southern Command, Attention: SCJ2-SM-CFO (FOIA)”.3511 NW 91st Avenue, Miami, FL 33172-1217.
- (25) U.S. Special Operations Command. U.S. Special Operations Command, Attention: SOCS-SJS-SI (FOIA), 7701 Tampa Point Blvd., MacDill AFB, FL 33621-5323.
- (26) U.S. Strategic Command. U.S. Strategic Command, Attention: CS50, 901 SAC Blvd., STE 1C17, Offutt AFB, NE 68113-6000.
- (27) U.S. Transportation Command. US Transportation Command, Chief, Command Information Management, ATTN: TCCSIM, 508 Scott Drive, Scott AFB IL, 62225-5357.
- (28) Interagency Security Classification Appeals Panel
<http://www.archives.gov/isoo/oversight-groups/iscap/index.html>
- (29) Principal Mandatory Declassification Review (MDR) Contacts at Federal Agencies
<http://www.archives.gov/isoo/contact/mdr-contact.html>

Dated: December 21, 2011.

Aaron Siegel,
Alternate OSD Federal Register Liaison Officer,
Department of Defense.

[FR Doc. 2011-33104 Filed 12/23/2011 at 8:45 am; Publication Date: 12/27/2011]